

103^D CONGRESS
1ST SESSION

H. R. 2970

To reauthorize the Office of Special Counsel, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 6, 1993

Mr. McCLOSKEY introduced the following bill; which was referred to the
Committee on Post Office and Civil Service

A BILL

To reauthorize the Office of Special Counsel, and for other
purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. REAUTHORIZATION.**

4 Section 8(a)(2) of the Whistleblower Protection Act
5 of 1989 (5 U.S.C. 5509 note) is amended by striking
6 “1989, 1990, 1991, and 1992” and inserting “1994 and
7 1995”.

8 **SEC. 2. OFFICE OF SPECIAL COUNSEL.**

9 (a) AUTHORITY TO CONTINUE SERVING PENDING
10 THE APPOINTMENT OF A SUCCESSOR.—Section 1211(b)
11 of title 5, United States Code, is amended by inserting

1 after the third sentence the following: “The Special Coun-
2 sel may continue to serve after the expiration of the Spe-
3 cial Counsel’s term until a successor has qualified, but for
4 not longer than 1 year.”.

5 (b) LIMITATIONS ON DISCLOSURES.—Section
6 1212(g) of title 5, United States Code, is amended to read
7 as follows:

8 “(g)(1) The Special Counsel may not respond to any
9 inquiry or provide information concerning either any per-
10 son making an allegation under section 1214(a) or any
11 allegation so made, except in accordance with the provi-
12 sions of section 552a or as required by any other applica-
13 ble law.

14 “(2) If, or to the extent that, the allegation involves
15 a prohibited personnel practice described in paragraph (2),
16 (8), or (9) of section 2302(b), no disclosure described in
17 paragraph (1) may be made unless—

18 “(A) either of the exceptions permitting disclo-
19 sure under paragraph (1) is met; and

20 “(B)(i) the consent of the person who made
21 such allegation is obtained in advance; or

22 “(ii) the information is being sought by an
23 agency which requires such information in order to
24 make a determination concerning access, for the per-
25 son referred to in paragraph (1), to information the

1 unauthorized disclosure of which could be expected
2 to cause exceptionally grave damage to the national
3 security.”

4 (c) STANDARD APPLICABLE WITH RESPECT TO CER-
5 TAIN AGENCY FINDINGS.—Section 1213(e)(2)(A) of title
6 5, United States Code, is amended to read as follows:

7 “(A) the findings of the agency head are sup-
8 ported by clear and convincing evidence; and”.

9 (d) TECHNICAL CLARIFICATION.—The first sentence
10 of section 1213(g)(1) of title 5, United States Code, is
11 amended to read as follows: “If the Special Counsel re-
12 ceives information from an individual other than an indi-
13 vidual described in subparagraph (A) or (B) of subsection
14 (c)(2) which, if such individual were an individual de-
15 scribed in either of such subparagraphs, would be consid-
16 ered information of a type described in subsection (a), the
17 Special Counsel may transmit the information to the head
18 of the agency which the information concerns.”.

19 (e) INVESTIGATIONS.—Section 1214(a)(1) of title 5,
20 United States Code, is amended—

21 (1) in subparagraph (B) by striking “practice
22 under paragraph (1),” and inserting “practice,”;
23 and

24 (2) by striking subparagraph (C) and inserting
25 the following:

1 “(C) Unless an investigation under this section is ter-
2 minated, the Special Counsel shall, within 60 days after
3 notice is provided under subparagraph (B) with respect
4 to a particular allegation, and at least every 60 days there-
5 after, notify the person who made such allegation as to
6 the status of the investigation and any action which has
7 been taken by the Office of Special Counsel since notice
8 was last given under this subsection.

9 “(D)(i) Except as provided in clause (ii), no later
10 than 120 days after the date of receiving an allegation
11 of a prohibited personnel practice, the Special Counsel
12 shall determine whether there are reasonable grounds to
13 believe that a prohibited personnel practice has occurred,
14 exists, or is to be taken.

15 “(ii) The deadline under clause (i) may be extended
16 by written agreement between the Special Counsel and the
17 person who made the allegation involved.

18 “(E) A determination by the Special Counsel under
19 this paragraph shall not be admissible in any judicial or
20 administrative proceeding except in the same cir-
21 cumstances as would apply under paragraph (2)(B) with
22 respect to a written statement under paragraph (2)(A).”.

23 (f) CLARIFICATION RELATING TO BURDEN OF
24 PROOF.—Section 1214(b)(4)(B)(i) is amended, and
25 1221(e)(1) (as amended by section 3(b)) is further amend-

1 ed, by striking the period at the end and inserting “, not-
 2 withstanding the provisions of section 7701(c)(1).”.

3 (g) ADDITIONAL INFORMATION TO BE INCLUDED IN
 4 ANNUAL REPORTS.—Section 1218 of title 5, United
 5 States Code, is amended by inserting “the number of in-
 6 stances in which it did not make a timely determination
 7 under section 1214(a)(1),” after “investigations con-
 8 ducted by it,”.

9 (h) EFFECTIVE DATE.—The amendments made by
 10 subsection (e) shall apply with respect to any allegation
 11 first received by the Office of Special Counsel on or after
 12 the effective date of this Act.

13 **SEC. 3. INDIVIDUAL RIGHT OF ACTION RELATING TO THE**
 14 **MERIT SYSTEMS PROTECTION BOARD.**

15 (a) SUBPOENAS.—Section 1221(d)(1) of title 5,
 16 United States Code, is amended to read as follows:

17 “(d)(1) At the request of an employee, former em-
 18 ployee, or applicant for employment seeking corrective ac-
 19 tion under subsection (a), the Board shall issue a sub-
 20 poena for the attendance and testimony of any person or
 21 the production of documentary or other evidence from any
 22 person if the Board finds that the matter requested—

23 “(A) is not unduly burdensome;

24 “(B) is not privileged or otherwise protected
 25 from disclosure by law, rule, or regulation; and

1 “(C) is relevant to the subject matter involved
2 in the pending action or appears reasonably cal-
3 culated to lead to the discovery of admissible evi-
4 dence.”.

5 (b) BURDEN OF PROOF.—Section 1221(e) of title 5,
6 United States Code, is amended to read as follows:

7 “(e)(1) Subject to paragraph (2), in any case involv-
8 ing an allegation of a prohibited personnel practice de-
9 scribed in paragraph (8) or (9) of section 2302(b), the
10 Board shall order such corrective action as the Board con-
11 siders appropriate if the employee, former employee, or
12 applicant for employment has demonstrated that protected
13 conduct under such paragraph (8) or (9) (as defined in
14 paragraph (3)(A) or (B), as applicable) was a contributing
15 factor in the personnel action which was taken or is to
16 be taken against such employee, former employee, or
17 applicant.

18 “(2) Corrective action under paragraph (1) may not
19 be ordered if the agency demonstrates by clear and con-
20 vincing evidence that it would have taken the same person-
21 nel action in the absence of the protected conduct involved.

22 “(3) For the purpose of this subsection, the term
23 ‘protected conduct’ means—

1 “(A) with respect to paragraph (8) of section
 2 2302(b), any disclosure described in subparagraph
 3 (A) or (B) of such paragraph; and

4 “(B) with respect to paragraph (9) of section
 5 2302(b), any conduct described in subparagraph
 6 (A), (B), (C), or (D) of such paragraph.”.

7 (c) REFERRALS FOR POSSIBLE DISCIPLINARY AC-
 8 TION.—Section 1221(f) of title 5, United States Code, is
 9 amended by adding after paragraph (2) the following:

10 “(3) If, based on evidence presented to it under this
 11 section, the Merit Systems Protection Board determines
 12 that there is reason to believe that a current employee may
 13 have committed a prohibited personnel practice, the Board
 14 shall refer the matter to the Special Counsel for investiga-
 15 tion and appropriate action under section 1215.”.

16 **SEC. 4. PROHIBITED PERSONNEL PRACTICES.**

17 (a) PERSONNEL ACTIONS.—

18 (1) IN GENERAL.—Section 2302(a)(2)(A) of
 19 title 5, United States Code, is amended—

20 (A) in clause (ix) by striking “and” after
 21 the semicolon; and

22 (B) by redesignating clause (x) as clause
 23 (xiv) and inserting before such clause the
 24 following:

1 “(x) a decision to require psychiatric testing or
2 examination;

3 “(xi) a denial, revocation, or other determina-
4 tion relating to a security clearance;

5 “(xii) a removal (other than a removal which is
6 covered by clause (iii) or which is based on perform-
7 ance);

8 “(xiii) a decision to commence a formal inves-
9 tigation that may result in criminal prosecution or
10 an adverse personnel action (as defined by any other
11 clause of this subparagraph); and”.

12 (2) CONFORMING AMENDMENT.—Section
13 2302(a) of title 5, United States Code, is amended
14 by striking “clauses (i) through (x)” and inserting
15 “clauses (i) through (xiv)”.

16 (b) COVERED POSITIONS.—Section 2302(a)(2)(B) of
17 title 5, United States Code, is amended to read as follows:

18 “(B) ‘covered position’, as used with respect to
19 an employee or applicant for employment, means
20 any position in the competitive service, a career ap-
21 pointee position in the Senior Executive Service, a
22 position in the excepted service, or a position covered
23 by chapter 74 of title 38, but does not include any
24 position which, as of the date on which the employee

1 began serving in the position or the applicant ap-
2 plied for such position (as the case may be), was—

3 “(i) excepted from the competitive service
4 because of its confidential, policy-determining,
5 policy-making, or policy-advocating character;
6 or

7 “(ii) excluded from the coverage of this
8 section by the President based on a determina-
9 tion by the President that it is necessary and
10 warranted by conditions of good administra-
11 tion.”.

12 (c) AGENCIES.—Section 2302(a)(2)(C) of title 5,
13 United States Code, is amended—

14 (i) in clause (i) by striking “corporation;” and
15 inserting “corporation (except for purposes of sub-
16 section (b)(8) and any other provision of this section
17 if, or to the extent that, it relates to subsection
18 (b)(8));”; and

19 (ii) in clause (ii) by striking “activities; or” and
20 inserting “activities (except for the same purposes as
21 set forth parenthetically in clause (i)); or”.

22 (d) INFORMATION.—Section 2302(c) of title 5,
23 United States Code, is amended in the first sentence by
24 striking “management.” and inserting “management, and
25 for ensuring (in consultation with the Office of Special

1 Counsel) that employees of such agency are informed of
 2 the rights and remedies available to them under this chap-
 3 ter and chapter 12.”.

4 (e) SENSE OF CONGRESS.—It is the sense of the Con-
 5 gress that a Federal employee or applicant for Federal
 6 employment who makes a disclosure described in section
 7 2302(b)(8) of title 5, United States Code, should not be
 8 prosecuted, or threatened with prosecution, under section
 9 205 of title 18, United States Code, for such disclosure.

10 **SEC. 5. ADDITIONAL AMENDMENTS RELATING TO PROCE-**
 11 **DURES UNDER WHICH INDIVIDUALS MAY**
 12 **SEEK RELIEF FROM PROHIBITED PERSON-**
 13 **NEL PRACTICES.**

14 (a) INDIVIDUAL RIGHT OF ACTION BEFORE MSPB
 15 AVAILABLE FOR PROHIBITED PERSONNEL PRACTICES
 16 GENERALLY.—

17 (1) IN GENERAL.—Section 1221(a) of title 5,
 18 United States Code, is amended by striking “prac-
 19 tice described in section 2302(b)(8),” and inserting
 20 “practice,”.

21 (2) EXCEPTION.—Section 1221(b) of title 5,
 22 United States Code, is amended to read as follows:
 23 “(b) Nothing in this subchapter shall be considered
 24 to create any right to seek corrective action with respect

1 to a prohibited personnel practice described in section
2 2302(b)(1).”.

3 (3) TECHNICAL CORRECTION.—Section 1221(a)
4 is amended by striking “subsection 1214(a)(3)” and
5 inserting “section 1214(a)(3)”.

6 (b) REVIEW BY THE UNITED STATES COURT OF AP-
7 PEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.—

8 (1) IN GENERAL.—Sections 1214(c)(2) and
9 1221(h)(2) of title 5, United States Code, are each
10 amended to read as follows:

11 “(2)(A) A petition for review under this subsection
12 shall be filed with the United States Court of Appeals for
13 the District of Columbia Circuit within 30 days after the
14 date the petitioner receives notice of the final order or de-
15 cision of the Board.

16 “(B) The provisions of section 706 shall govern any
17 such review, notwithstanding any provision of section
18 7703(b)(1).

19 “(C) For purposes of applying the provisions of sec-
20 tion 7703(d) with respect to any matter as to which judi-
21 cial review is sought under this subsection, the reference
22 in such provisions to the ‘United States Court of Appeals
23 for the Federal Circuit’ shall be deemed to be a reference
24 to the ‘United States Court of Appeals for the District
25 of Columbia Circuit’.”.

1 (2) CONFORMING AMENDMENT.—Section
2 7703(b)(1) of title 5, United States Code, is amend-
3 ed by striking “subsection,” and inserting “sub-
4 section or section 1214(c)(2) or 1221(h)(2),”.

5 (c) AMENDMENTS RELATING TO THE “PASS-
6 THROUGH” REQUIREMENT.—Section 1214(a)(3) of title
7 5, United States Code, is amended—

8 (1) by adding at the end the following:

9 “This paragraph shall not apply with respect to a prohib-
10 ited personnel practice described in section 2302(b)(8).”;

11 (2) by redesignating subparagraphs (A) and
12 (B) as subparagraphs (B) and (C), respectively; and

13 (3) by striking the matter before subparagraph
14 (B) (as so redesignated by paragraph (2)) and in-
15 serting the following:

16 “(3) Except as provided in the last sentence of this
17 paragraph, an employee, former employee, or applicant for
18 employment may not seek corrective action from the
19 Board under section 1221 unless—

20 “(A) such employee, former employee, or appli-
21 cant has sought corrective action from the Special
22 Counsel under this subchapter;”.

23 (d) CHOICE OF REMEDIES.—

1 (1) IN GENERAL.—Chapter 12 of title 5, United
2 States Code, is amended by adding at the end the
3 following:

4 “SUBCHAPTER IV—JUDICIAL REVIEW

5 **“§ 1231. Judicial review**

6 “(a) Subject to section 1232, any employee, former
7 employee, or applicant for employment may, with respect
8 to any personnel action taken, or proposed to be taken,
9 against such employee, former employee, or applicant for
10 employment, as a result of a prohibited personnel practice
11 (other than a prohibited personnel practice described in
12 section 2302(b)(1)), bring a civil action in the appropriate
13 district court of the United States.

14 “(b) The district courts of the United States shall
15 have jurisdiction of actions brought under this subchapter
16 without regard to the amount in controversy.

17 “(c) An action under this subchapter—

18 “(1) shall be brought in the district court of the
19 United States for the judicial district in which the
20 prohibited personnel practice is alleged to have been
21 committed, in which the employment records rel-
22 evant to such practice are maintained and adminis-
23 tered, or in which the aggrieved person works or
24 would have worked but for the alleged prohibited
25 personnel practice; and

1 “(2)(A) in the case of a prohibited personnel
2 practice described in section 2302(b)(8), shall be
3 brought within 120 days after the alleged prohibited
4 personnel practice occurred; or

5 “(B) in the case of a prohibited personnel prac-
6 tice other than a prohibited personnel practice de-
7 scribed in paragraph (1) or (8) of section 2302(b)—

8 “(i) may be brought only after such per-
9 son’s administrative remedies under section
10 1214 have been exhausted; and

11 “(ii) must be brought within 60 days after
12 the exhaustion requirement referred to in clause
13 (i) has first been met.

14 For purposes of paragraph (2)(B), a person’s administra-
15 tive remedies under section 1214 shall be considered to
16 have been exhausted once subparagraph (B) or (C) of sec-
17 tion 1214(a)(3) has been satisfied. Review of any matter
18 brought in accordance with paragraph (2)(B) shall be de
19 novo.

20 **“§ 1232. Choice of remedies**

21 “(a)(1) With respect to a prohibited personnel prac-
22 tice described in section 2302(b)(8), an aggrieved person
23 may raise the matter under not more than any 1 of the
24 following:

25 “(A) Subchapter II.

1 “(B) Subchapter III.

2 “(C) A negotiated grievance procedure referred
3 to in section 7121 (if available).

4 “(D) Section 1231.

5 “(2) A person shall be considered to have exercised
6 such person’s option to raise a matter under any of the
7 alternatives listed under paragraph (1) at such time as
8 such person timely initiates an action under the applicable
9 statutory procedures or timely files a grievance in writing.

10 “(b)(1) With respect to a prohibited personnel prac-
11 tice other than a prohibited personnel practice described
12 in paragraph (1) or (8) of section 2302(b), an aggrieved
13 person may raise the matter under either of the following
14 (but not both):

15 “(A) The provisions of law referred to in sub-
16 section (a)(1)(B) (including any subsequent right of
17 action under section 1221 or 1231, but not both).

18 “(B) A negotiated grievance procedure referred
19 to in section 7121 (if available).

20 “(2) A person shall be considered to have exercised
21 such person’s option to raise a matter under either of the
22 alternatives listed under paragraph (1) (including, at the
23 appropriate point in time, and if applicable, the options
24 referred to parenthetically in paragraph (1)(A)) at such
25 time as the person timely initiates an action under the

1 applicable statutory procedures or timely files a grievance
2 in writing.”.

3 (2) TECHNICAL AND CONFORMING AMEND-
4 MENTS.—

5 (A) SECTION 1214.—Section 1214 of title
6 5, United States Code, is amended by adding at
7 the end the following:

8 “(g) For choice of remedies provisions relevant to this
9 section, see section 1232.”.

10 (B) SECTION 1221.—Section 1221 of title
11 5, United States Code, is amended by adding at
12 the end the following:

13 “(k) For choice of remedies provisions relevant to this
14 section, see section 1232.”.

15 (C) SECTION 7121.—Section 7121 of title
16 5, United States Code, is amended by adding at
17 the end the following:

18 “(g) For choice of remedies provisions relevant to this
19 section, see section 1232.”.

20 (3) CHAPTER ANALYSIS.—The analysis for
21 chapter 12 of title 5, United States Code, is amend-
22 ed by striking “Sec.” each place it appears, by in-
23 serting “Sec.” as a flush left item after the item re-
24 lating to subchapter I, and by adding at the end the
25 following:

“1231. Judicial review.

“1232. Choice of remedies.”.

1 (e) AUTHORITIES WHICH MAY BE EXTENDED TO
2 ARBITRATORS.—Section 7121(b) of title 5, United States
3 Code, is amended—

4 (1) by redesignating subparagraphs (A) through
5 (C) as clauses (i) through (iii), respectively;

6 (2) by redesignating paragraphs (1) through
7 (3) as subparagraphs (A) through (C), respectively;

8 (3) by striking “(b)” and inserting “(b)(1)”;
9 and

10 (4) by adding at the end the following:

11 “(2)(A) The provisions of a negotiated grievance pro-
12 cedure providing for binding arbitration in accordance
13 with paragraph (1)(C)(iii) may, if or to the extent that
14 an alleged prohibited personnel practice is involved, allow
15 the arbitrator to order—

16 “(i) a stay of any personnel action in a manner
17 similar to the manner described in section 1221(c)
18 with respect to the Merit Systems Protection Board;
19 and

20 “(ii) any disciplinary action allowable under
21 section 1215, consistent with the due process rights
22 afforded under such section.

1 “(B) With respect to any disciplinary action imposed
2 by an arbitrator pursuant to subparagraph (A)(ii), judicial
3 review of the order imposing such disciplinary action may
4 be obtained in the same manner and on the same basis
5 as could be obtained under section 1215(a)(4) if such an
6 order had been issued by the Merit Systems Protection
7 Board.”.

8 **SEC. 6. PERFORMANCE APPRAISALS.**

9 Paragraph (5) of section 4313 of title 5, United
10 States Code, is amended to read as follows:

11 “(5) meeting affirmative action goals, achieve-
12 ment of equal employment opportunity requirements,
13 and compliance with the merit systems principles set
14 forth in section 2301.”.

15 **SEC. 7. IMPLEMENTATION.**

16 (a) **POLICY STATEMENT.**—No later than 6 months
17 after the date of the enactment of this Act, the Special
18 Counsel shall issue a policy statement regarding the imple-
19 mentation of the amendments made by the Whistleblower
20 Protection Act of 1989. Such policy statement shall be
21 made available to each person alleging a prohibited per-
22 sonnel practice described in section 2302(b)(8) of title 5,
23 United States Code, and shall include detailed guidelines
24 identifying specific categories of information that may (or
25 may not) be communicated to agency officials for an inves-

1 tigative purpose, or for the purpose of obtaining corrective
2 action under section 1214 of title 5, United States Code,
3 or disciplinary action under section 1215 of such title, the
4 circumstances under which such information is likely to
5 be disclosed, and whether or not the consent of any person
6 is required in advance of any such communication.

7 (b) TERMINATION STATEMENT.—The Special Coun-
8 sel shall include in any written statement under section
9 1214(a)(2)(A) of title 5, United States Code, the name
10 and telephone number of an employee of the Office of Spe-
11 cial Counsel who shall be available to respond to reason-
12 able questions from the person regarding the investigation
13 involved, the relevant facts ascertained by the Special
14 Counsel, and the law applicable to the person’s allegations.

15 **SEC. 8. AMENDMENTS RELATING TO ATTORNEY’S FEES.**

16 (a) CHAPTER 12.—Section 1221(g) of title 5, United
17 States Code, is amended by striking “attorney’s fees” each
18 place it appears and inserting “fees for legal representa-
19 tion”.

20 (b) CHAPTER 77.—Section 7701(g) of title 5, United
21 States Code, is amended—

22 (1) by striking “attorney fees” each place it ap-
23 pears and inserting “fees for legal representation”;
24 and

25 (2) in paragraph (1)—

1 (A) by inserting “substantially” before
2 “prevailing”; and

3 (B) by striking “agency or any case in
4 which the agency’s action was clearly without
5 merit.” and inserting “agency, in which the
6 agency’s action was clearly without merit, or
7 which is settled or otherwise similarly re-
8 solved.”.

9 **SEC. 9. EFFECTIVE DATE; SAVINGS PROVISION.**

10 (a) IN GENERAL.—The provisions of this Act shall
11 take effect 120 days after the date of the enactment of
12 this Act.

13 (b) SAVINGS PROVISION.—No provision of this Act
14 shall affect any administrative proceeding pending at the
15 time such provisions take effect. Orders shall be issued
16 in such proceedings and appeals shall be taken therefrom
17 as if this Act had not been enacted.

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